SUPREME COURT, U. S.

FILED

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1966

No. 1021

ROBERT G. MOOREMAN, Trustee of the Estate of Laing-Garrett Construction Specialties, Inc.,

Petitioner,

vs.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported in 366 F. 2d 686. The opinion of the District Court is unreported. Both are reproduced in the Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered September 19, 1966. Rehearing was denied November 10, 1966. The jurisdiction of this Court is invoked under 28 U.S.C.A. Section 1254 (1).

QUESTIONS PRESENTED

I.

May a Circuit Court of Appeals found its decision upon "facts" nowhere found in the record, and further, substitute its judgment for that of a Trial Court where there is substantial (and no conflicting) evidence to support the determination of the Trial Court?

II.

Can a corporation "authorize" its president to embezzle corporate funds and appropriate them to his own use, where such is beyond the scope of powers granted by its charter, and is by statute declared a crime?

III.

Can failure of a corporate officer to discover an embezzlement by the corporation's president constitute

either: a bestowal of actual "authority," or a holding out of apparent authority to embezzle, or appropriate corporate funds to his personal use in the future?

IV.

May one contracting with a corporate president in his personal capacity, assist him to appropriate corporate funds to his own use, and accept such funds in satisfaction of a personal debt?

STATUTES INVOLVED

Arizona Revised Statutes, Section 10-193; and Arizona Revised Statutes, Sections 13-681 and 13-682, are set forth in the Appendix.

STATEMENT OF THE CASE

Respondent in 1957 issued to Laing-Garrett Construction Specialties, Inc. a policy insuring the life of its president, Charles W. Laing. The corporation at all times remained the "rights owner" and beneficiary of the policy. In August of 1960 Respondent granted to the corporation a loan of $2,491.46 against the policy. Coincidentally Respondent had also issued a similar policy to Charles W. Laing personally, naming his wife as beneficiary and on which he was $458.55 in arrears in payment of premiums at the time of the corporate loan. At the request of Mr. Laing, Respondent paid only $2,032.91 of the loan proceeds to the corporation, and took the remaining $458.55 to pay Laing's personal premiums then in arrears. Respond-

ent did not inquire of anyone else whether such transfer was authorized. Laing did not enter the transaction on the corporate books and neither the shortage, nor the use of $458.55 by him personally, was in any way reflected on the books. Laing died in April 1961. Petitioner as Trustee of the then bankrupt corporation made claim against the policy. Respondent denied the claim, stating that the policy had lapsed for non-payment of the January, 1961, quarterly premium. Action upon the policy was filed in the District Court pursuant to Title 28, U.S.C. 1332.

The Trial Court found Laing was not actually or apparently authorized to direct use of corporate funds for payment of premiums on his personally owned policy, that Respondent was not authorized to use the corporate funds for payment of Laing's personal premiums; and that if Laing had ever paid his own premiums with corporate funds in the past, that the corporation and its other officer (Mr. Hilkert) had no knowledge of it. The District Court concluded that the policy was in effect at the date of death as Respondent could not lapse the policy when it was indebted to the policy owner in a sum sufficient to pay the premiums.

The Court of Appeals reversed, finding that by putting Laing in management of the company he was bestowed with *authority* to do as he saw fit, including even using corporate funds for personal uses; that he had paid his premiums in the past with corporate funds, and that Mr. Hilkert as the only other officer in failing to discover this and stop it had bestowed

authority upon Laing to appropriate the corporate loan proceeds; that such bestowal of authority was also binding on the Trustee in Bankruptcy and the corporation.

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS FOR THE NINTH CIRCUIT HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO REQUIRE AN EXERCISE OF THIS COURT'S SUPERVISORY POWERS.

The Circuit Court has *created* "facts" essential to support its decision. This is not a mere substitution of an Appellate Court's judgment for that of a lower Court where contradictory evidence exists. Rather the crucial "facts" which in the opinion justify the holding are non-existent, are nowhere found in the record, and are contrary to the entire record. Such conduct by a Federal Circuit Court of Appeals is inexcusable and incomprehensible.

The Court "found the facts" to be that Laing had been using company money in the past, to such an extent that "at the time of his death he had overdrawn his salary in the amount of approximately $22,000;" that contrary to express findings by the lower Court, Hilkert, the other officer, did know of this, that such could be ascertained from the company books, that Hilkert as secretary did not perform his duties, and by allowing Laing management of the company without control of regular meetings and Minutes, *authorized* Laing to do as he saw fit. Nothing exists in the record to support any of these find-

ings. For example, the record actually shows Laing's salary account reflected the corporation was indebted to him in the sum of $1,798.30 at the time of his death, rather than a $22,000.00 debit (pages 320-321; Exhibits "Z" and "11"*); the corporation did meet and keep Minutes (pages 262-263); the books did not reveal Laing's use of corporate money in the past, including airplane tickets (page 265), or to pay insurance premiums on a personal policy (page 323); and the corporation had neither actual nor implied notice thereof (Trial Court's Finding No. 12). Neither does the record support a conclusion that Hilkert was not performing his duties as secretary, or by virtue of being secretary he was chargeable as a matter of law with knowledge of embezzlements carefully concealed on the books.

Clearly the opinion not only misstates the uncontroverted facts, but "from out of the blue" finds additional facts necessary to its conclusions. Its decision is, therefore, founded upon false premises and cannot be sustained.

Peculiarly the opinion offers absolutely no justification for its statements, nor for upsetting findings of the Trial Court. In fact, it ignores such as if they didn't even exist. There is no possible way the Court of Appeals could find apparent authority and therefore, reliance by Respondent, when only two days preceding the diversion they had refused Laing's request for the loan, and required written confirmation of

*Page references are to Reporter's Transcript of Trial Proceedings. Exhibit references are to Exhibits a part of the record on appeal.

authority from the corporation. (While not in itself grounds for certiorari, if this Petition is granted, Petitioner will request the Court consider the Appeals Court's violation of the "clearly erroneous rule.")

While Courts understandably differ in their application of law, such a "reworking" of facts as done here and issuance of opinions which bear so little resemblance to the cases involved make opinions of the Ninth Circuit a farce. Such conduct requires the intervention by the Supreme Court in its supervisory capacity. Litigants and all attorneys practicing before the Federal Bar are entitled to know that opinions of a Circuit Court are accurate reflections of cases reported; that Circuit Courts, like any other Court, are not immune to reprimand if they overstep their limits; that the Supreme Court of the United States in its supervisory capacity is ever willing to intervene in proceedings where a Circuit Court does depart from the usual course of judicial proceedings to the extent that the litigants are not granted a fair and judicial determination.

Fitzgerald v. United States Lines, 83 S. Ct. 1646, 374 U.S. 16, 10 L. Ed. 700 (1963);

Price v. Johnston, 68 S. Ct. 1049, 334 U.S. 266, 9 L. Ed. 1356 (9th Cir., 1948);

Graver Tank & Mfg. Company v. Linde Air Products Company, 69 S. Ct. 535, 336 U.S. 271, 93 L. Ed. 672;

McAllister v. United States, 75 S. Ct. 6, 348 U.S. 19, 99 L. Ed. 20 (1954);

Gutierrez v. Waterman Steamship Corp., 83 S. Ct. 1185, 373 U.S. 206, 10 L. Ed. 297 (1963).

II.

THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH DECISIONS OF THIS COURT AND ALSO APPLICABLE STATE LAW.

Appropriation of the corporation's assets to personal use of its officers was beyond the powers authorized by the corporate charter (Exhibit "1"). Such appropriation when also falsely entered on the books of the company was a crime (A.R.S. 10-193; A.R.S. 13-681 and 682). Hence the diversion of the corporate loan proceeds to payment of Laing's personal premium was ultra vires and against public policy. This Court in a long series of cases, including:

Central Transp. Co. v. Pullman's Palace Car Company, 139 U.S. 24, 11 S. Ct. 478, 35 L. Ed. 55;

Western Nat. Bank of New York v. Armstrong, 152 U.S. 346, 38 L. Ed. 420, 14 S. Ct. 572;

Aldrich v. Chemical National Bank, 176 U.S. 618, 44 L. Ed. 611, 20 S. Ct. 498;

has left no doubt that any attempt to use corporate assets for purposes beyond those specified in the corporate charter, and as here, also against public policy, are void and incapable of authorization. Arizona has expressly adopted the rule of the *Pullman* case above (*Trico Electric Cooperative v. Ralston,* 67 Ariz. 358, 196 P.2d 470 (1948)); and it was not the prerogative of the Court of Appeals to decline to follow this rule. See also: 3 Fletcher, Cyclopedia Corporations, § 1109, pages 736-737:

> "Directors or other corporate officers have no authority to use corporate funds to pay their pri-

> vate debts, even though the corporation is indebted to them, and 'the rule that an agent cannot use the property of his principal to pay his own debts applies to agents of every grade. The director of a corporation is no more exempt from this rule than the humblest agent in its service;' furthermore it is immaterial, according to some authorities, that a majority of the directors knew of such use and consented thereto, since a contract which directors have no power to make cannot be ratified by them."

and at pages 739-740:

> "A corporation has a cause of action against a person who knowingly accepts corporate funds in payment of the individual debt of an officer of the corporation . . . since in such case the person receiving the money and the officers are joint tortfeasors . . ."

In Arizona, as almost everywhere in the country, one who deals with an agent does so at his risk, if authority is questionable there is a duty to inquire, and the burden of proof of authority of an agent to bind his principal is upon the one who claims such. (*Bank of America National Trust and Savings Association v. Barnett, et al,* 87 Ariz. 96, 348 P.2d 296 (1960).)

The opinion of the Ninth Circuit is induced by an erroneous view of the law and without regard to the clearly established rules of the State of Arizona and this Court. (Actually, it is not even consistent with the law it cited in the opinion.)

CONCLUSION

The effect of the ruling of the Circuit Court is to deprive creditors of the bankrupt corporation of $76,000.00 plus interest, actually due to them on a contract-policy which the corporation had paid for. There is justification, factually or legally, for the Circuit Court's reversal. Obviously, their reversal was prompted by the thought that Mr. Hilkert would somehow benefit from the judgment; and that as the remaining officer of the corporation he should not be allowed to do so. The record does not support such a supposition. Whether or not Hilkert has filed a claim in the pending bankruptcy is immaterial; whether the claim would ultimately be approved and dividends allowed thereon is speculation. The function of the Court of Appeals was not to "try Hilkert," but rather only to determine if there was any substantial evidence to support the Trial Court's factual findings, and to review the Trial Court's application of the law. It may not "create" facts, nor refuse to apply applicable State Law because it is in disagreement with it. For such a flagrant abuse of its function, its decision warrants and requires review by this Court. A Writ of Certiorari should under these circumstances issue.

Dated, Phoenix, Arizona,
January 30, 1967.

Respectfully submitted,
WILLIAM P. MAHONEY, JR.,
BEVERLY J. MCCONNELL,
Attorneys for Petitioner.

(Appendix Follows)

Appendix

The pertinent sections of the Arizona Revised Statutes are:

Section 10-193. Receipt of corporate property without making record thereof; false book entries; penalty

A. It is unlawful for a director, officer or agent of a corporation or association to:

1. Knowingly receive or possess himself of any property of the corporation or association otherwise than in payment of a just demand, and, with intent to defraud, omit to make, cause or direct to be made, a full and true entry thereof in its books or accounts.

2. Defraud, destroy, alter, mutilate or falsify any books, papers, writings or securities belonging to such corporation or association, or make or concur in making, any false entries or omit or concur in omitting to make any material entry, in a book of accounts or other record or document kept by the corporation or association, with intent to defraud.

B. A person who violates this section shall be punished by imprisonment in the state prison for not less than three nor more than ten years, or by imprisonment in the county jail for not to exceed six months, and a fine not exceeding

five hundred dollars, or by both such fine and imprisonment.

Section 13-681. Definition

Theft by embezzlement is the fraudulent appropriation of property by a person to whom it has been entrusted whether or not such appropriation constitutes a distinct act of taking.

Section 13-682. Acts constituting offense

A person is guilty of theft by embezzlement who:

1. Is entrusted with, or has in his control, property for the use of any other person, and fraudulently appropriates to any use or purpose not in the due and lawful execution of his trust the property which he has in his possession or under his control by virtue of his trust, or secretes it with a fraudulent intent to appropriate it to such use or purpose.

United States District Court for the
District Of Arizona

Civ. No. 4359 Phx.

Robert G. Mooreman, Trustee of the Estate of Laing-Garrett Construction Specialties, Inc.,
Plaintiff,

vs.

Mutual of New York Life Insurance Company, a corporation,
Defendant.

OPINION, FINDINGS OF FACT AND CONCLUSIONS OF LAW

In this action plaintiff Robert G. Mooreman, Trustee of the Estate of Laing-Garrett Construction Specialties, Inc., seeks to recover from defendant Mutual of New York Life Insurance Company the sum of $80,000 plus interest due thereon from the 22d day of April, 1961, upon a policy of insurance, defendant's Exhibit "A", executed by defendant, No. 823-53-41S, upon the life of Charles W. Laing. A copy of said policy of insurance, marked Exhibit "A", is annexed to and made a part by reference of the original complaint herein.

The Laing-Garrett Construction Specialties, Inc., hereinafter referred to as the Laing Corporation, was,

prior to its adjudication in bankruptcy, engaged in the construction specialties business. At all times in question, its Board of Directors was composed of Charles W. Laing, President, and E. J. Hilkert, Secretary-Treasurer, Mr. Laing serving as General Manager of the operation of the business and Mr. Hilkert serving only in an advisory capacity when special questions came to his attention.

Plaintiff is the Trustee in Bankruptcy of the Estate of the Laing Corporation and brings this action pursuant to an Order of this Court. Defendant Mutual of New York Life Insurance Company, a corporation, hereinafter referred to as Insurance Company, a licensed insurer in the State of Arizona, issued three policies of insurance upon the life of Laing; to-wit:

A. Policy #823-53-41S (Exhibit "A") naming the Laing Corporation as the beneficiary and also the "rights owner".

B. Policy #8396309 naming Mrs. Laing as the beneficiary and Mr. Laing as the owner (not admitted in evidence).

C. Policy #8006801S also naming Mrs. Laing as the beneficiary and Mr. Laing as the owner, (also not admitted in evidence).

Although reference has been made to all three policies at the trial, Policy #823-53-41S (Exhibit "A") is the policy in issue here and the subject of this law suit. Said policy will hereinafter be referred to as the corporate policy.

The corporate policy was issued by the Insurance Company on August 26, 1957. It was in the face amount of $40,000 but it also provided that:

> "The amount of the Accidental Death Benefit will be doubled in the event that the death for which the Benefit is payable occurred as the result of riding as a passenger in an aircraft * * *."

The Laing Corporation is named as beneficiary and "rights owner". "Rights" by the policy being defined as:

> "* * * the rights to change the beneficiary, to assign, and all other rights, benefits, options, and privileges conferred by this Policy or allowed by the Company."

The corporate policy provided for quarterly premiums of $364.80 due on the 27th days of October, January, April and July, of each year in which the policy was in effect, 31 days' grace being allowed thereafter. Whether the premium due January 27, 1961 has been paid is the principal issue in this action.

Laing, the insured on the corporate policy, was killed April 22, 1961, as the result of riding as a passenger in an aircraft; plaintiff filed with the Insurance Company a claim for death benefits under the policy, which claim was disallowed by the defendant Insurance Company for the asserted reason that prior to the death of the insured, Charles W. Laing, the corporate policy lapsed for non-payment of the January 27, 1961 premium.

If the January 27, 1961 premium has been paid, the policy was in full force and effect at the date of death, and benefits are due to the beneficiary and therefore, its successor, the plaintiff herein. If the January 27, 1961 premium has not been paid, the policy has lapsed.

It is plaintiff's contention that the defendant Insurance Company was indebted to the Laing Corporation in the sum of $458.55 on the 27th day of January, 1961, and that being so indebted, the said sum of $458.55 should, and as a matter of law, conclusively have been presumed to be applied to the payment of the January, 1961 premium on the corporate policy #823-53-41S, and that, therefore, said policy was in full force and effect until after the death of the insured on April 22, 1961. This claim of indebtedness is based upon plaintiff's contention that defendant's application of the said sum of $458.55 of the loan proceeds on the corporate policy to the payment of Laing's own personal policy was unauthorized and that therefore, on January 27, 1961, defendant held money in its possession belonging to the Laing Corporation sufficient in amount to pay said premium of January 27, 1961.

The following taken from defendant Insurance Company's statement of facts in its opening memorandum is undisputed. Laing was one of the incorporators of the Laing Corporation; he was one of the only two stockholders; one of the only two directors; as president, one of the only two officers and the sole managing agent of the corporation. The only other stockholder and director was the corporation's Secretary-Treasurer, E. J. Hilkert, who was also one of the incorporators. Hilkert testified that he never took an active part in the operations of the company and his only relation to it, really, was as the corporation's major creditor by reason of due and unpaid salary in the amount of $80,000.

Defendant Insurance Company in its Answer to the plaintiff's Amended Complaint admits the following:

1. That plaintiff is the duly appointed, qualified and acting Trustee of the Estate of Laing-Garrett Construction Specialties, Inc., Bankrupt, and pursuant to the Order of the District Court for the District of Arizona, brings this action for and on behalf of said bankrupt estate, and the creditors of said bankrupt.

2. That it is a corporation duly licensed to do insurance business within the State of Arizona.

3. That it issued the corporate policy of insurance, #823-53-41S, on August 26, 1957, in the face amount of $40,000 upon the life of Charles W. Laing, payable to the Laing Corporation.

4. That said policy provides for an additional death benefit equal to the face amount of the policy in the event of death occurring as the result of riding as a passenger in an aircraft, and admits that said insured died as a result thereof on April 22, 1961.

Defendant Insurance Company alleges that said corporate policy had lapsed for non-payment of the premium due January 27, 1961, and that pursuant to provisions thereof, the policy became reduced paid-up insurance in the amount of $351.31, which sum, defendant's Exhibit "D", was tendered by the Insurance Company to the beneficiary Laing Corporation and was accepted by the Trustee herein as full settlement of benefits due upon the corporate policy, and Insurance Company denies that anything is owing by it upon said policy.

Plaintiff's contentions are the following:

1. That Insurance Company was indebted to the Laing Corporation and the Trustee in the sum of $458.55 and held same for plaintiff's benefit on January 27, 1961.

2. Plaintiff's claim of such indebtedness by the Insurance Company is based upon the following:

In August of 1960, Mr. Tom Lillico, as the Phoenix representative of defendant Insurance Company, discussed making a loan against the corporate policy with Laing. At the request of the Insurance Company and pursuant to its normal procedure for processing such a loan, formal application for the loan (Exhibit "H") was submitted to Hilkert who signed it. The loan requested was $2,491.46. As a further requirement for approval of the loan, written confirmation of Hilkert's authority to sign the application on behalf of the corporation was also requested. The application itself also bears the notation as follows: "Subject to Resol. of B of D of Corp. authorizing Secretary to request loan." This written confirmation of the Secretary's authority was received by letter from Laing on Laing Corporation stationary (Exhibit "I"). The loan application made by the Laing Corporation was approved and checks for the loan proceeds were delivered by Lillico. Disbursements of the loan of $2,491.46 were as follows:

(1) To pay July 27, 1960 premium on corporate policy #823-53-41S (Exhibit "A")	$ 346.80
(2) To pay premium on policy #83-96-309 owned by Laing personally	458.55
(3) Balance to the Laing Corporation by check (Exhibit "E")	1668.11
	$2491.46

Plaintiff contends that disbursement of the sum of $458.55 of Laing Corporation loan proceeds in payment of premium on Policy #83-96-309 owned by Laing personally was made at the oral request of Laing only, without any request, authorization or confirmation of authority by E. J. Hilkert. The sum of $458.55 of the Corporation loan proceeds which were used to pay Laing's personal premium were more than sufficient to pay the January 27, 1961 premium on the corporate policy and keep the policy in effect through the date of death.

3. That being indebted to plaintiff in a sum sufficient to pay the January, 1961 premium, Insurance Company is, as a matter of law, conclusively presumed to have applied said indebtedness to prevent a lapse of the corporate policy, and said policy was, therefore, at the date of death of Laing, in full force and effect.

Plaintiff Trustee asserts that inadvertent and unauthorized endorsement and deposit of the "settlement check" of $351.31 (Exhibit "D") into plaintiff's account without his knowledge, and without knowledge

of the person depositing same of facts sufficient to show it was incorrect, and without an actual intent to accept it in full settlement, does not constitute an accord and satisfaction, settlement or release, of a just contractual claim.

Defendant Insurance Company, relying upon nonpayment of a premium as ground for forfeiting the corporate policy, has the burden of proving such nonpayment.

> "[1] It is the general rule of law that, where an insurer pleads and relies upon the nonpayment of a premium * * * for forfeiting the policy after it has once been placed in force, the burden of proving such nonpayment is upon it."
>
> *Sovereign Camp W.O.W. v. Madrigal* (Ariz.), 12 P.2d 615, 616.

Forfeiture of an insurance policy will not be declared if under any reasonable theory of construction it can be avoided.

> "[2, 3] * * * it is practically a universal rule of construction that an insurance contract is construed most strongly against the insurer. 32 C.J. 1152. It is also the rule of law that a forfeiture of a policy will never be declared if under any reasonable theory of construction it can be avoided. 32 C.J. 1296."
>
> *Northern British & M. Ins. Co. v. San Francisco Secur. Corp.* (Ariz.), 249 P. 761, 762.

It therefore appears from the evidence that on and before January 27, 1961, defendant Insurance Company was indebted to the Laing Corporation in the

sum of $458.55, as shown above by page vi, line 1, and page viii, line 2, of this Opinion.

See *Commonwealth Life Insurance Co. v. Gault's Adm'rs* (Ky.), 76 S.W.2d 618, 620. There the Court stated:

> "[1, 2] It is an accepted rule: 'If an insurer is indebted to an insured, and has, or should have, in its hands, sufficient funds belonging to and due him, to pay an assessment or a premium when due, it cannot forfeit its policy or certificate for non-payment; rather, it should appropriate such funds to prevent a forfeiture, no matter from what source such funds were derived.'"

And the Supreme Court of Arizona has taken the same position:

> "The uncontradicted evidence is that defendant had on hand at all times the sum of $229.70 belonging to the insured which the latter could apply upon his premium if he so desired, and, indeed, it was the duty of the insurer, if such sum would have paid a premium installment due, to make such application rather than to allow the policy to lapse."
>
> *Equitable Life Assur. Soc. of the United States v. Rettid,* 11 P.2d 833, 837.

On the question that the law does not favor forfeiture of insurance policies, the Court of Appeals of Kentucky in *Cheek v. Commonwealth Life Ins. Co.,* 126 S.W.2d 1084, 1090, had the following to say:

> "[16-17] It is axiomatic that the law does not favor forfeitures of insurance policies. To

that end, as stated upon abundant authority in Commonwealth Life Insurance Company v. Gault's Adm'rs, supra, 76 S.W.2d 620: 'It is an accepted rule: "If an insurer is indebted to an insured, and has, or should have, in its hands, sufficient funds belonging to and due him, to pay an assessment or a premium when due, it cannot forfeit its policy or certificate for non-payment; rather, it should appropriate such funds to prevent a forfeiture, no matter from what source such funds were derived."'"

Mr. William D. Price, a witness called on behalf of the defendant, testified in part as follows: That he was an accountant for the Trustee in Bankruptcy in this matter and that his appointment was shortly after the Trustee was appointed. Price testified under examination by Miss McConnell, plaintiff's attorney: (Tr. 327)

"Q Now, Mr. Price, I will hand you what has been marked as Defendant's Exhibit D, which is the check from Mutual of New York to the Laing-Garrett Construction Specialties for $351.31 and which is alleged to have been a settlement check on the policy.

"Have you ever seen that check before?

* * *

"A I believe that I may have seen this check before. In fact, I believe I would have to say that I have seen it before.

"Q Did you personally deposit this check in the Trustee's account?

"A No, ma'am.

* * *"

(Tr. 328, line 14):

(By Miss McConnell) "Q Can you tell from examining the check who deposited the check to the trustee's account?

"A I would say that it was done by our office, the secretary in the office.

"The Court: What office is that?

"The Witness: My office, the accounting office.

* * *"

(Tr. 329):

"Q I am talking primarily about your Phoenix office.

"A We have probably eight or nine people.

"Q You state that this was deposited by one of the girls in the office?

"A By the receptionist and the secretary.

"Q Was this at your instructions?

"A No.

"Q Was she authorized to deposit and accept a settlement check without express instructions from you or the trustee?

"A No, ma'am.

* * *

"Miss McConnell: Q If the check had come to your attention, Mr. Price, would you have deposited it without specific instructions to take it?

"A Most of these checks dealing other than just with accounts receivable that come in through our office for the various bankruptcy accounts are transmitted to us by a letter from the Trustee or the attorney for the Trustee with special instructions as to what to do with them.

"Q Did you ever receive that instruction from the trustee or any of his representatives to deposit this check?

"A No, ma'am.

"Q At the time the check was deposited, did you personally have any knowledge that the amount of the check was incorrect?

"A No, ma'am.

"Q Or that there was possibly any dispute about the check or the amount due to the estate from the insurance company on this policy?

"A Not at that particular time, I did not."

In the *Cheek v. Commonwealth Life Ins. Co.* case, 126 S.W.2d 1084 at 1089, the Court, dealing with a question of a purported release such as is claimed here, held:

"[7] As stated in Horn v. Atlas Assurance Society, 241 Ky. 226, 43 S.W.2d 675, 678: 'Where one releases a claim in ignorance of the existence of a right, as where by mistake one assumes a debt due him to be smaller than it is, he is not estopped from collecting the balance. * * * It is like the payment made by the company in New York Life Insurance Company v. Van Meter's Adm'r, 137 Ky. 4, 121 S.W. 438, 136 Am.St.Rep. 282, in settlement of a cash value of a life insurance contract of a sum much less than the value fixed by the policy.'"

The Court must find from the uncontradicted testimony of the witness William D. Price, Tr. 328, that Exhibit "D", the check for $351.31 bearing on its face the statement "in full settlement of payee's interest Policy Number 823 53 41 in payment of Death Benefit," was deposited by the Secretary-Receptionist in the office of Mr. Price, the Accountant. This deposit was made without knowledge of the Trustee. On the

reverse side of the check, Exhibit "D", appears an endorsement, "For deposit only Estate of Liang-Garrett Construction Specialties, Robert G. Mooreman, Trustee-Receiver." Under the testimony, the handwriting could not possibly be that of Robert G. Mooreman. It evidently is the handwriting of the Secretary-Receptionist in Mr. Price's office. The signature "Robert G. Mooreman" is undoubtedly in the same handwriting as the balance of the handwriting in the deposit endorsement. Furthermore, the Trustee would have no authority to settle this litigation without the approval of the Court. General Order in Bankruptcy 33, 11 U.S.C.A. following § 53, clearly indicates that a trustee in bankruptcy must have the authority of the Court "to submit to arbitration any controversy arising in the settlement of an estate, or for authority to compromise any such controversy."

A judgment rendered on behalf of plaintiff in this action would include interest at the rate of 6% per annum on the amount thereof from the date of the rendition of said judgment until paid. *Arizona Eastern R. Co. v. Head,* 224 P. 1057 (Ariz.).

As to the jurisdiction of the Court, § 46 of 11 U.S.C.A. provides:

> "(a) The United States district courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings under this title, between receivers and trustees as such and adverse claimants, concerning the property acquired or claimed by the receivers or trustees, in the same manner and to the same extent as though such proceedings had not been

instituted and such controversies had been between the bankrupts and such adverse claimants.

"(b) Suits by the receiver and the trustee shall be brought or prosecuted only in the courts where the bankrupt might have brought or prosecuted them if proceedings under this title had not been instituted, unless by consent of the defendant, except as provided in sections 96, 107, and 110 of this title."

The articles of incorporation of the Laing Corporation were filed with the Arizona Corporation Commission on March 28, 1950 (plaintiff's Exhibit 1). We have seen that the defendant Insurance Company has admitted, among other matters, that it was and is a corporation duly licensed to do insurance business within the State of Arizona. It is apparent, therefore, that the Mutual of New York Life Insurance Company is not a corporation organized and existing under and by virtue of the laws of Arizona.

Section 1391 of 28 U.S.C.A., in part, provides:

"(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes."

So, therefore, the Laing Corporation might have prosecuted the defendant Insurance Company in the United States District Court for the District of Arizona prior to the institution of bankruptcy proceedings. However, this defendant Insurance Com-

pany has consented, within the meaning of 11 U.S.C.A. § 46(b), to the institution and prosecution of this action.

McEldowney v. Card (E.D. Tenn.), 193 F. 475, was an action brought by the plaintiff McEldowney as Trustee in Bankruptcy of the Estate of the Clairfield Lumber Company to recover the sum of $9,000, alleged to be due him. On page 478, District Judge Sanford, in his opinion, stated:

> "The authorities are uniform that it is not necessary that the consent of the proposed defendant shall be given in writing or upon the record in express terms or in advance of the institution of the suit, but that he will be deemed to have sufficiently consented if he appears and pleads to the merits, without objection to the jurisdiction for want of consent, and will not be allowed thereafter to withdraw his consent or object to the jurisdiction of the court on the ground of want of consent."

At the outset of the trial of this case (Tr. 8), the Court inquired:

> "The Court: No question about Federal jurisdiction here, is there?
>
> "Miss McConnell: I don't believe so, your Honor. The plaintiff is a representative of the bankruptcy court, and the amount in question certainly exceeds any jurisdictional limits."

Defendant was silent. Here was an opportunity to object to the jurisdiction for want of defendant's consent if, indeed, such consent was required under

the circumstances here. At no time throughout the trial or in any of the defendant's written memoranda has there been a suggestion on the part of the defendant that it did not consent to the institution and prosecution of this action and of the proceedings therein.

The defendant here has earnestly and vigorously contested every contention of the plaintiff and, as held by Judge Sanford in the quotation above, the defendant will be deemed to have sufficiently consented by its appearance and pleadings to the merits without objection to the jurisdiction for want of consent and will not be allowed thereafter to withdraw its consent or object to the jurisdiction of the Court on the ground of want of consent.

This Court has jurisdiction of this action and of the parties hereto.

Now, upon consideration of all the evidence adduced at the trial and in addition to the findings hereinabove set forth including the admissions of the defendant, the Court makes the following findings of fact:

FINDINGS OF FACT

1. That plaintiff is the duly appointed, qualified, and acting Trustee of the Estate of Laing-Garrett Construction Specialties, Inc., Bankrupt, and pursuant to the Order of the District Court for the District of Arizona, brings this action for and on behalf of said bankrupt estate and the creditors of said bankrupt against defendant Mutual of New York Life Insurance Company.

That said defendant is a corporation duly licensed to do business within the State of Arizona.

2. That this Court has jurisdiction of this action and of the parties hereto.

3. That on or about the 26th day of August, 1957, and for valuable consideration therein stated, the defendant, by its agents duly authorized thereto, executed its policy of insurance No. 823-53-41S in writing upon the life of Charles W. Laing in the sum of $40,000.

4. That said policy provides that in the event that the death for which the benefit is payable occurred as a result of riding as a passenger in an aircraft, that the accidental death benefit will be equal to double the face amount, stated on page 1 of the policy, Exhibit "A".

5. That on or about the 22d day of April, 1961, said insured Charles W. Laing died as a result of riding as a passenger in an aircraft.

6. That said Laing Corporation had a valuable insurable interest in the life of the insured at the time of his death and at the time of effecting said insurance in that the said insured was the president and officer of Laing Corporation, whose continued management was essential to the operation of said business; that the said Laing Corporation was the beneficiary named in the policy above referred to.

7. That plaintiff has heretofore and prior to the commencement of this action given to defendant due notice and proof of death of insured, and demanded payment of the proceeds of said policy.

8. That said sum has not been paid nor any part thereof.

9. That defendant Insurance Company was, on and before January 27, 1961, indebted to the Laing Corporation in the sum of $458.55 and then held the same for the benefit of the Laing Corporation.

10. That Laing did not at any time have apparent nor implied authority to use corporate funds to pay any premium on Policy # 83-96-309 owned by Charles W. Laing personally; and that said Laing had no authority to use said sum of $458.55 to pay a premium on his said policy, and had no authority to instruct the Insurance Company to apply said sum of $458.55 in payment upon his personal policy.

11. That defendant Insurance Company had no right nor authority to use the said indebtedness, $458.55 of corporate loan proceeds, to pay a premium on Policy # 83-96-309 owned by Charles W. Laing personally, or upon the payment of any other policy other than the "corporate policy."

12. That the Laing Corporation did not at any time have actual nor implied notice of use of corporate funds by Laing to pay any premium on his said personal Policy #83-96-309.

13. That being indebted to plaintiff in a sum sufficient to pay the January, 1961 premium, defendant Insurance Company should and is conclusively presumed to have applied said indebtedness to payment of the premium of January 27, 1961, and thereby prevent a lapse of said policy.

14. That the premium which became due January 27, 1961, on the said corporate policy was paid within the time required by said policy and that, therefore, the said policy was, on and before January 27, 1961, and after the death of the said Charles W. Laing, in full force and effect.

15. That the so-called settlement check, Exhibit "D", was not endorsed by the Plaintiff-Trustee, Robert G. Mooreman, and that the endorsement thereon was unauthorized and said deposit was inadvertently and mistakenly made without an actual intent to accept it as a settlement.

CONCLUSIONS OF LAW

As conclusions of law from the foregoing facts, the Court decides:

1. That the premium which became due on Policy #823-53-41S, the corporate policy, was paid on and before January 27, 1961, and that said corporate policy was in full force and effect at the time of and after the death of the insured on April 22, 1961.

2. That the said endorsement and deposit of the so-called settlement check, Exhibit "D", does not constitute an accord, satisfaction, settlement or release of any just contractual claim of the plaintiff and was not accepted as such by the plaintiff.

3. That the plaintiff, Robert G. Mooreman, as Trustee of the Estate of Laing-Garrett Construction Specialties, Inc., is entitled to judgment against the defendant Mutual of New York Life Insurance Com-

pany, a corporation, in the sum of $80,000 with interest thereon, at the rate of 6% per annum from the date of rendition of said judgment, until paid, together with his costs herein incurred.

In accordance herewith, the plaintiff shall submit a form of judgment to the Court.

Dated: This 15th day of December, 1964.

Roger T. Foley,
U. S. Senior District Judge.

United States District Court for the
District of Arizona

Civ. No. 4359 Phx.

Robert G. Mooreman, Trustee of the Estate of Laing-Garrett Construction Specialties, Inc.,
Plaintiff,
vs.
Mutual of New York Life Insurance Company, a corporation,
Defendant.

AMENDED CONCLUSION OF LAW

This matter coming on regularly for trial the 4th day of December, 1963, plaintiff appearing in person and by his attorney, Beverly J. McConnell, defendant appearing by its counsel, Ralph J. Lester, evidence having been presented, the Court being fully advised in the premises, and having rendered its Opinion, Findings of Fact and Conclusions of Law on the 15th day of December, 1964.

Now, Judgment herein not having yet been entered, the Court hereby makes the following amended conclusion of law: [Cohn v. United States, 6 Cir., 259 F. 2d 371]

3. That the defendant, Mutual of New York Life Insurance Company, a corporation, is now and has

been, at all times since the 22d day of April, 1961, indebted to Laing-Garrett Construction Specialties, Inc. for the face amount of Policy #823-53-41S, the corporate policy, with double indemnity, to-wit: $80,000.00 less the sum of $3,261.70 being the total sum of the following items:

The unpaid loan balance of	$ 2,491.46
together with interest thereon to January 27, 1961 in the sum of	51.08
Also less the partial payment of	351.31
Also less the premium due on October 27, 1960 on said corporate policy in the sum of	364.80
together with interest thereon to January 27, 1961 in the sum of	3.05
TOTAL	$ 3,261.70
Leaving a balance of	$76,738.30
to which is to be added the sum of being the difference between the sum of $458.55 of proceeds of said corporate loan wrongfully diverted by defendant and the premium due on said corporate policy on January 27, 1961, in the sum of $364.80.	93.75
GRAND TOTAL	$76,832.05

Dated: This 26th day of April, 1965.

Roger T. Foley,
U. S. Senior District Judge.

United States Court of Appeals
for the Ninth Circuit

The Mutual Life Insurance Company of New York, a corporation, Defendant-Appellant, vs. Robert G. Mooreman, Trustee of the Estate of Laing-Garrett Construction Specialties, Inc., Plaintiff-Appellee.	No. 20,225

[September 19, 1966]

On Appeal from the United States District Court
for the District of Arizona

Before: Hamlin, Merrill and Duniway, Circuit Judges

Merrill, Circuit Judge:

The question on this appeal is whether a policy of life insurance issued by appellant had lapsed for non-payment of a premium prior to the death of the insured.[1] The District Court ruled that it had not; that while the crucial premium had not been paid by the owner, appellant at that time was indebted to the owner in an amount in excess of the premium and that payment must therefore be presumed to have been made by operation of law.

---

[1]Jurisdiction is grounded on the Bankruptcy Act, 30 Stat. 552 (1898), as amended, 11 U.S.C. §46 (1964).

Appellee is trustee in bankruptcy of the Arizona corporation which was the owner and beneficiary of the policy in question. The policy insured the life of Charles W. Laing, president of the corporation. Laing died April 22, 1961. This suit was brought by appellee to recover the death benefits provided by the policy.

The alleged lapse occurred as follows: The quarterly premium due October 27, 1960, was not paid by the beneficiary corporation but was paid by application of an automatic premium loan provision contained in the policy. The premium due January 27, 1961, was not paid. The policy prohibited the payment of two successive premiums through the application of the automatic premium loan provision. On March 22, 1961, appellant notified the beneficiary corporation that the policy had lapsed through nonpayment and the expiration of a 31 day grace period, but that the policy might be reinstated if the company chose to apply for reinstatement and pay the back premiums. By the time of Laing's death, a month later, the beneficiary had not applied for reinstatement.

The indebtedness of appellant to the beneficiary corporation which the District Court found to exist arose in this manner: On August 30, 1960, the beneficiary corporation applied to appellant for, and was granted, a loan on its policy in the sum of $2,491.46. The proceeds were applied as follows: $364.80 was applied as payment of the premium on the corporate policy due July 27, 1960; a check in the sum of $1,668 was issued to the beneficiary corporation and subsequently de-

posited by it in its bank account; the sum of $458.55 was, on the oral instructions of Laing, applied by appellant as payment of a premium due on a different policy insuring Laing's life on which Mrs. Laing was the beneficiary and in which the corporation had no interest. This last payment of $458.55 constitutes the alleged debt in issue. The District Court found that Laing was without corporate authority, actual or apparent, to appropriate corporate funds in this manner. The sum of $458.55 having never been paid to the borrower remained due and owing.

Appellant here contends that the record establishes as matter of law that Laing had both apparent and implied actual authority to use corporate funds in this manner. We agree.

The corporate stock was owned in equal shares by Laing and one Hilkert, who served nominally as secretary-treasurer. The board of directors consisted of Laing and Hilkert,[2] but the actual operation of the corporation was most informal. No regular meetings were held or minute books kept; Laing, who was experienced in the construction field in which the corporation operated, was the general manager and conducted the business affairs. Hilkert, although on salary, performed none of the normal duties of his offices. He did not participate in the day-to-day operations or in the keeping of the books or records and paid almost no attention to the corporate business, but confined himself to his practice of law and accounting in a separate office. He testified: "I only devoted part

[2]Arizona does not have the common requirement for at least three directors.

time when I was called upon for special things * * * whenever there was anything out of the ordinary that required concurrence, Mr. Laing usually came to my office and discussed the matter."

Both Hilkert and Laing maintained open accounts with the corporation and used corporate credit for certain personal purposes. Hilkert testified that these were confined to "accommodation purchases" of merchandise on which the corporation received a discount. The corporation was billed for such purchases, paid for them with corporate funds, and the amounts so paid were charged on the open account against the purchaser. In Hilkert's case such charges were against his unpaid salary, and at the time of bankruptcy the corporation was indebted to him in the sum of $80,000, largely for salary. (As such he is one of the principal creditors of the bankrupt estate.) Laing's case was quite different. His account apparently reflected not only "accommodation purchases," but also cash withdrawals and general personal uses of various sorts, including an airline trip for himself and his wife. At the time of his death he had overdrawn his salary in the amount of approximately $22,000. (Hilkert testified that Laing's book debt was somehow balanced by another account in the name of Mrs. Laing, containing personal funds of both the Laings plus corporate funds.)

Hilkert was asked whether, as far as he was concerned, there was "anything for or against using the credit of the corporation or the cash of the corporation for private purposes." He answered: "Except

that if there was anything that I felt was overdoing it, I objected to it * * *. In other words, there was always, we will say, a limit in the tolerance between Mr. Laing and I" in such use of corporate credit.

Thus the record establishes an understanding between the stockholders of the corporation that, subject to reimbursement to the corporation, Laing could feel free to use corporate credit or cash for personal needs, subject only to Hilkert's objection if Laing were felt to be "overdoing it."

Laing's personal insurance policy was taken out in March, 1959. Two weeks later Laing applied to the insurance company for its "MONY-Matic monthly premium check plan," an arrangement whereby the insurance company could draw directly on the bank account of the premium payer for premiums due. Here the application was to draw upon the corporate bank account in the amount of $149.03 each month. It was signed "C. W. Laing, President," and "R. C. Stremble," a corporate employee authorized to sign checks.

Thereafter, MONY-Matic payments were drawn directly from the corporate account through March, 1960, and the next two premiums were paid by corporate check. That these payments were made was sufficiently demonstrated by bank records introduced in evidence, plus charges on the corporation's books in precisely the amount of the premiums. That they were made would also be apparent to anyone familiar with the business, as the canceled drafts were returned to the corporation each month with other canceled checks,

and they bore the Mutual plan's identification on their face. No objection was ever made by Hilkert.

In our judgment, under the arrangement between the stockholders, Laing reasonably could feel authorized to charge his open account with insurance premiums until objection was voiced by Hilkert. We conclude that he was impliedly authorized to act in that manner. *Restatement (Second), Agency* §7 comment c; §43 (1958).[3]

At the time of the transaction here in question the insurance company was aware that for over a year the corporation had been paying premiums on Laing's personal policy, that such payment plan appeared to have corporate authority at the outset, and that no corporate protest had ever been made. The application for the loan was itself signed by Hilkert, which gave added assurance that the corporation was aware of dealings with the insurer. The use made of the proceeds of the loan was in no significant respect different from the MONY-Matic transactions; the premium simply was paid directly out of corporate cash instead of through the corporate bank account.

Hilkert testified (and the District Court found) that he had no knowledge of the MONY-Matic arrangement or payments. In our view he should be charged with such knowledge. Had he been performing the duties for which he now claims compensation he certainly would have known. But more, knowledge was not essential to authority. Under his arrangement

---

[3]See also *Sweet v. Lang*, 14 F.2d 762 (8th Cir. 1926); *Reif v. Equitable Life Assur. Soc.*, 268 N.Y. 269, 197 N.E. 278 (1935); *Gonzales & Co. v. Thomas*, 42 Ariz. 308, 25 P.2d 552 (1933).

with Laing, if Laing's exercise of his general authority was to be kept within bounds, it was Hilkert's obligation to keep himself informed as to the extent of Laing's borrowings.

Appellee contends that the arrangement between Hilkert and Laing must be disregarded as not the formal act of the corporation. This contention we reject. The facts are clear that both stockholders joined in dispensing with any need for formal corporate action. Hilkert's conduct invited Laing to hold himself out as possessing full corporate authority to engage in the questioned transaction. That conduct in a corporation as closely held and informally operated as this one is chargeable to the corporation, at least where no insolvency is proved to result from the transaction.[4]

We conclude that Laing was invested by the corporation with apparent authority to make personal use of corporate funds on the occasions in question, on which apparent authority the insurance company justifiably relied. *Restatement (Second), Agency* §49 comments b, c; §43 (1958).[5]

It follows that no debt was owed to the corporation by the insurance company at the time the corporate policy lapsed.

Judgment reversed.

---

[4]*Sweet v. Lang, supra,* note 2; *Little v. Garabrant,* 35 N.Y.Supp. 689 (Sup.Ct. 1895); *Bashford-Burmeister Co. v. Hammons,* 36 Ariz. 173, 283 Pac. 926 (1930).

[5]See also *Hall v. Crawford & Delphenis,* 11 S.W.2d 804 (Tex. Civ.App. 1928); *Glens Falls Indemnity Co. v. Palmetto Bank,* 23 F.Supp. 844 (W.D.S.C. 1938); *Arizona Southwest Bank v. Odam,* 38 Ariz. 394, 300 Pac. 195 (1931).

United States Court of Appeals
For The Ninth Circuit

The Mutual Life Insurance Company of New York, a corp., Defendant-Appellant, vs. Robert G. Mooreman, etc. Plaintiff-Appellee.	No. 20,225

JUDGMENT

Appeal from the United States District Court for the District of Arizona.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Arizona, and was duly submitted.

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed, with costs in this Court in favor of Mutual Life Insurance and against Robert G. Mooreman.

COSTS:

Fee: Notice of appeal	$5.00
Cert. Fee:	2.00
One-half docket fee:	12.50
Reporter's trans.	407.13
Reproduction charges	14.60
Premium on sup. bond	1660.00
TOTAL	$2101.23

Filed and entered September 19, 1966.

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IN THE

Supreme Court of the United States

October Term, 1966

No. 1021

ROBERT G. MOOREMAN, Trustee of the Estate of Laing-Garrett Construction Specialties, Inc.,
Petitioner,

vs.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a corporation,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

October Term, 1966

No. 1021

ROBERT G. MOOREMAN, Trustee of the Estate of Laing-Garrett Construction Specialties, Inc.,

Petitioner,

vs.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a corporation,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Questions Presented

I.

When the material facts are not in dispute, may the Court of Appeals reverse the Trial Court on the ground that its findings as to the effect of such facts were induced by an erroneous view of the law?

II.

Can a solvent private corporation, all stockholders, officers and directors consenting, authorize its general manager to use $458.55 of corporate funds for his personal use?

III.

Can a solvent private corporation, intentionally or negligently, clothe its general manager with apparent authority to use $458.55 of corporate funds for his personal use?

Statutes Involved

The statutes cited by petitioner are irrelevant to the issues. Moreover, with the exception of Arizona Revised Statutes, Sec. 10-193, which was cited to the Court of Appeals without argument, these statutes were not urged as involved below, nor was any contention or finding made below that the general manager was guilty of embezzlement when he used the $458.55 in question to pay premiums on his personal policy.

Statement of the Case

The basic facts material to the issues presented are set forth in the opinion of the Court of Appeals, supplemented by this statement concerning the corporation's bankruptcy and petitioner's role as plaintiff.

The corporation was adjudicated bankrupt on August 31, 1961, more than a year after the questioned transaction of August 30, 1960. There was, moreover, no allegation or proof that the corporation was insolvent on August 30, 1960, or, that it was rendered insolvent by the $458.55 transfer. The business continued as a going concern until Laing's unexpected death, 8 months later on April 22, 1961.

Petitioner's role in this litigation is as successor to the corporation's beneficial interest in the insurance policy, and not as a representative of creditors suing for monies had and received.

REASONS FOR DENYING THE WRIT

I. The Court of Appeals in resolving the disputed conclusions to be drawn from the undisputed facts committed no error.

The decision below is a narrow one turning on its own peculiar facts. Moreover, the Court's application to those facts of basic rules of agency law presents no principle or

issue novel to the most ordinary of commercial transactions. Finally, there is no broad public interest presented by the Court's resolution of the disputed conclusions of fact, namely, that the $458.55 premium payment was an authorized use of corporate assets, that in any event the respondent was justified in relying on the general manager's apparent authority, and lastly that there was no debt owed to the corporation by the respondent at the time the policy lapsed.

No amount of unrestrained and unsupported criticism can turn the Court's carefully reasoned and documented opinion into a "farce", so "inexcusable and incomprehensible" as to "require intervention" and "reprimand" by the Supreme Court. Yet petitioner attempts to do so by alleging that the Court of Appeals "created" the "crucial facts" which justify its holding that Laing had apparent, as well as implied, authority on August 30, 1960 to use $458.55 of corporate funds to pay premiums then due on his personal policy. That the petition is frivolous and the grievance without substance is made manifest by comparing petitioner's specifications with the record.

Petitioner claims that "Nothing exists in the record to support any of these findings", namely that (Petition, p. 5):

> * * * Laing had been using company money in the past, to such an extent that "at the time of his death he had overdrawn his salary in the amount of approximately $22,000"; that contrary to express findings by the lower Court, Hilkert the other officer, did know of this, that such could be ascertained from the company books, that Hilkert as secretary did not perform his duties, and by allowing Laing management of the company without control of regular meetings and Minutes, *authorized* Laing to do as he saw fit.

Although the petitioner here paraphrases, and in the last line clearly overstates, the Court's findings, the "crucial" facts as found by the Court, have abundant record support as shown in A to D below.

A. Laing's Prior Use of Corporate Funds—To Pay Personal Premiums

Payment of Laing's premiums with $458.55 of corporate funds on August 30, 1960 was merely a continuation of a method of payment (by corporate check) unquestioned by the corporation for the previous year and a half (Def.'s Exs. "N", p. 83 and "O", p. 87; pp. 156-58, 280-81, 312-14). These were all openly made and disclosed on the corporation's books (p. 313) which were not only available to Hilkert (p. 269) but regularly audited by his associate (pp. 239-41, 347-51). Moreover, the cancelled checks aggregating $1,900.00, were all returned to the corporation together with the bank's monthly statements (pp. 283-84, 331).

B. Corporate Notice of the Questioned August 30, 1960 Transaction

Hilkert had signed the loan note for a policy loan in the amount of $2,491.46 (p. 142). The respondent's loan check on the other hand, was for $1,668.11 (pp. 153-54). In explanation, respondent mailed to the corporation (p. 184-5) its "Statement of Policy Loan Transaction" (Def. Ex. "P", p. 91) which showed the application of $364.80 of the total loan proceeds of $2,491.46 to pay the premium then due on the corporate policy, as well as the application of the questioned $458.55 to pay premiums on Mr. Laing's personal policy numbered 839-63-09s (pp. 176-77).

Hilkert made no protest of the use of $458.55 at that time or after the policy's lapse when it was again called to his attention (pp. 205-212).

C. Laing's Other Uses of Corporate Funds—Also Ascertainable From the Records

Although there was no corporate resolution either for or against Laing's or Hilkert's use of corporate funds for private purposes (pp. 241, 345-6), Hilkert acknowledged that the officers as was "common in practically every corporation," had authority to maintain open accounts (p. 339).

He had such an account (Def. Ex. "A-1", p. 296) and he knew that Laing had one although "I don't know what was reflected through it all the time" (p. 247). The fact is that Laing's account shows in the period from March, 1959 through March, 1961, a debt balance for corporate monies used for personal purposes ranging from $34,000 to approximately $22,000 at his death (Def. Ex. "Z", p. 292; p. 298). While some of this represented "accommodation purchases" for Laing's personal use, much of it was the result of direct "cash disbursements" (identified as "C.D." in the ledger sheets, Def. Exhibit "Z") to Laing from the corporate treasury (pp. 302-03, 308-09). Many of the cash disbursements were substantially greater than $458.55 (p. 304).

Hilkert summed up his position with regard to Laing's use of corporate credit or cash as follows (p. 346):

> Except that if there was anything that I felt was overdoing it, I objected to it * * *. In other words, there was always, we will say, a limit in the tolerance between Mr. Laing and I, and before that, Mr. Laing, Mr. Garrett and I, in how much they could use the company for personal use, using company credit.

This tolerance included, among other things, Mr. Laing's and even Mrs. Laing's use of the corporation's credit for personal airline travel (pp. 252-53, 344-45).

Although Hilkert said that according to the books Laing's account was highly overdrawn (p. 253) and that he was heavily indebted to the corporation (p. 254), petitioner complains that the Court did not offset the debits listed in Exhibit "Z" by the credits listed in plaintiff's Exhibit "11" (p. 319) which would have left a balance due Laing of $1,798.30. Of course, in that case the $458.55 is also offset against Laing's "just demand" against the corporation. In any event, a decision as to the propriety of such an offset was unnecessary to a resolution of the issues before the Court. What was pertinent was the incontestable fact that Laing had authority " * * * to use corporate credit or cash for personal needs, subject only to Hilkert's objection if

Laing were felt to be 'overdoing it'." (Court of Appeals Op., pp. 3-4).

D. Hilkert's Acquiescence in Laing's Management

Laing and Hilkert were the only stockholders (p. 234). They were also the only directors and officers. Laing was President and Hilkert, Secretary-Treasurer (pp. 235-37). Hilkert was frank to say that he did not participate in the normal day-to-day operations of the business, or even in the keeping of the books and records, but confined his activity to giving his opinion as an accountant, if and when consulted (pp. 260-1). He testified that the company was informally run with the common consent of the two owners (p. 271), that minutes were not regularly kept and that he (Hilkert) had no minute book and could find none (pp. 263, 271), that Laing was the general manager (p. 272) and ran the corporation (pp. 237, 269-70).

The District Court had found it to be "undisputed" that Laing was the sole managing agent, and that Hilkert the only other stockholder and director "* * * never took an active part in the operation of the company and his only relation to it, really, was as the corporation's major creditor by reason of due and unpaid salary in the amount of $80,000" (Pet. App., p. vi).

As shown, Laing's use of corporate funds to pay his premiums and for other personal purposes was readily ascertainable from the company's books and other records. The District Court, moreover, traced the whole controversy regarding respondent's acceptance of the $458.55 premium payment to Hilkert's negligence (Judge Foley's letter of January 25, 1965 reproduced in respondent's Appendix). And, as the Court of Appeals put it (Op., p. 5):

> * * * Had he [Hilkert] been performing the duties for which he now claims compensation he certainly would have known [about Laing's prior premium payments, etc.]. But more, knowledge was not essential to authority. Under his arrangement with Laing,

> if Laing's exercise of his general authority was to be kept within bounds, it was Hilkert's obligation to keep informed as to the extent of Laing's borrowings.

Whether Hilkert was negligent or acquiescent, the legal result is the same, namely, that Laing's conduct in the context of this closely held and informally run corporation was chargeable to the corporation (*Arizona Southwest Bank* v. *Odam,* 38 Ariz. 394, 300 Pac. 195 (1931); *Bashford-Burmister Co.* v. *Hammons,* 36 Ariz. 173, 283 Pac. 926 (1930); Restatement (Second), Agency, § 43 (1958); 2 Fletcher, Cyclopedia of Corporations, perm. ed., § 445, p. 345 (1954)).

We respectfully submit that the "crucial facts" which spell out Laing's implied and apparent authority are incontrovertible and that petitioner's many assertions that these facts are "non-existent", taken "from out of the blue" and are "nowhere found in the record" are patently irresponsible.

Petitioner's attempt to cast the issue in terms of an embezzlement is also out of order. There is neither proof nor finding that Laing intended to defraud the corporation, a statutory requisite for embezzlement. Moreover, the determinative finding was that Laing had implied authority to so use the $458.55. In any event, whether or not Laing was guilty of a crime because, as petitioner claims, he did not thereafter debit his account for $458.55 is not something which is chargeable to the respondent. Accordingly, the embezzlement contention is irrelevant to the finding of Laing's apparent authority and of respondent's justified reliance thereon. 2 Fletcher, *op. cit. supra,* § 463; *Glens Falls Indemnity Co.* v. *Palmetto Bank,* 23 F. Supp. 844 (1938), *aff'd* 104 F. 2d 671 (4th Cir. 1939); *Sweet* v. *Lang,* 14 F. 2d 762 (8th Cir. 1926).

Finally, petitioner misconceives what is a basic function of the Court of Appeals, namely, to resolve the disputed conclusions to be drawn from undisputed facts. *Kippen* v.

American Automatic Typewriter Co., 324 F. 2d 742 (9th Cir. 1963). Here, the Court simply found that the District Court's holding was induced by an erroneous application of established principles of corporate and agency law and, moreover, in view of the uncontroverted evidence, was clearly erroneous. *United States* v. *United States Gypsum Co., et al.*, 333 U.S. 364 (1948).

II. There is no conflict with applicable State Law.

There is nothing improper or outside the object of its creation for a close corporation such as this, to authorize its officers to borrow funds for their personal accommodation. Such authorization is one of the most ordinary applications of implied or incidental power.

Yet petitioner asserts that the use of $458.55 in question was an *ultra vires* act void *ab initio*. His theory is that any appropriation of corporation assets to an officer's personal use is beyond the powers authorized by the corporation's charter. He also insists that Laing was guilty of embezzlement when he did not enter the use of the $458.55 in his ledger account of monies borrowed from the corporation, and that this nullifies, on the ground of *ultra vires*, any prior authorization or subsequent corporate acquiescence. Petitioner is unconcerned that respondent cannot be charged with knowledge of any such abuse of Laing's authority, or of misappropriation, even if such were proved. He similarly brushes aside that Hilkert is the one who put Laing in command, the one who clothed him with authority and the one to be charged with such knowledge and acquiescence therein. Cf. *Arizona Southwest Bank* v. *Odam*, 38 Ariz. 394, 300 Pac. 195 (1931); *Higgins* v. *Arizona Sav. and Loan Ass'n*, 85 Ariz. 6, 330 P. 2d 504 (1958); 19 Am. Jur. 2d *Corporations* § 1121 (1965).

Petitioner misapplies the doctrine of *ultra vires* which, in a non-public controversy such as this, has as its basis the protection of the stockholders. Thus, when as here all

stockholders are held to have agreed to an officer's appropriation of corporate funds at a time when the corporation was a going concern,[1] a consenting stockholder cannot later challenge the officer's authority on the theory of *ultra vires*. *Oliver* v. *Safe Deposit and Title Guar. Co.*, 315 Pa. 552, 173 Atl. 281 (1934); *Lake Park Dev. Co. v. Paul Steenberg Const. Co.*, 201 Minn. 396, 276 N.W. 651 (1937); 19 Am Jur. 2d *Corporations* § 969 (1965); note, 83 Pa. L. Rev. 479, 491-92 (1935).

In *Bashford-Burmister Co.* v. *Hammons*, 36 Ariz. 173, 283 Pac. 926 (1930), the Supreme Court of Arizona stated the rule, in a non-public controversy such as this, to be as follows (36 Ariz. at 180-81, 283 Pac. at 928):

> While the stockholders as such are not agents of the corporation and cannot sell or dispose of its property, they are the equitable owners of its assets, and, when they stand by or actively encourage the officers they have selected to act for them to dispose of or handle the corporation's property in a way not permitted under its charter, and thereafter say nothing and do nothing over a long period of time, thereby tacitly ratifying and acquiescing in what was done, they should not be permitted to assert that the action of the directors was *ultra vires and void.* [Citations omitted.]
>
> In *Kent* v. *Quicksilver Mining Co., supra* (reading at page 185 of 78 N.Y.), the court announced this very sound rule:
>
> 'In the application of the doctrine of *ultra vires*, it is to be borne in mind that it has two phases: one where the public is concerned; one where the question is between the corporate body and the stockholders in it, or between it and its stockholders, and third parties dealing with it and through it with them. When the public is concerned to restrain a

[1] There being no proof to the contrary, the solvency of this going concern on August 30, 1960 is presumed. 19 C.J.S. *Corporations* § 1374 (1940); 15A Fletcher *op. cit. supra*, §§ 7362, 7364 (1954).

> corporation within the limit of the power given to it by its charter, an assent by the stockholders to the use of unauthorized power by the corporate body will be of no avail. When it is a question of the right of a stockholder to restrain the corporate body within its express or incidental powers, the stockholder may in many cases be denied, on the ground of his express assent or his intelligent though tacit consent to the corporate action. If there be a departure from statutory direction, which is to be considered merely a breach of trust to be restrained by a stockholder, it is pertinent to consider what has been his conduct in regard thereto. A corporation may do acts which affect the public to its harm, inasmuch as they are *per se* illegal or are *malum prohibitum*. Then no assent of stockholders can validate them. It may do acts not thus illegal, though there is want of power to do them, which affect only the interest of the stockholders. They may be made good by the assent of the stockholders, so that strangers to the stockholders dealing in good faith with the corporation will be protected in a reliance upon those acts.'

And, in specific response to the contention that Arizona should apply the rule of *Central Transportation Co.* v. *Pullman's Palace-Car Co.*, 139 U.S. 24 (1890), even though only private rights were involved, the Court said (36 Ariz. 173, at p. 181):

> * * * This is not the rule generally adopted in the state courts. It is not the rule in this state. [citations omitted]

Fletcher, in his Cyclopedia of the Law of Private Corporations, puts the rule this way (Vol. 7, § 3432 at pp. 592-93 (1964)):

> It is now generally held that unanimous [stockholder] consent is sufficient, even in the case of an actual or prospective gift or diversion of assets to a noncorporate purpose, such as the payment of the debts of officers or an accommodation guaranty, unless creditors are injured thereby, unless the act

> is not only ultra vires but in addition illegal and void. (Citing *Trico Electric Cooperative* v. *Ralston*, 67 Ariz. 358, 196 P. 2d 470 (1948).)

Trico Electric, supra, relied on by petitioner, merely illustrates the rule, as pointed out by the Arizona Supreme Court in *Bashford-Burmister Co.* v. *Hammons, supra*, to be applied when the public is directly concerned. In *Trico*, a corporation chartered to deal in plumbing fixtures, attempted to become a public water utility. Such a transformation, in accordance with the rule of *Central Transportation Co.* v. *Pullman's Palace Car Co.*, 139 U. S. 24, *supra*, was held to be *ultra vires* in the true sense, *i.e.*, beyond powers expressly or impliedly conferred. This rule, to be applied when the public was directly concerned, was also the rule prior to *Hammons* [2]. On the other hand, when private rights only are concerned, Arizona has uniformly applied the *Hammons* rule. See *Leon* v. *Citizens' Bldg. and Loan Ass'n*, 14 Ariz. 294, 127 Pac. 721 (1912) and *Higgins* v. *Arizona Savings and Loan Assn.*, 85 Ariz. 6, 330 P. 2d 504 (1958).

Moreover, petitioner's own authorities support the view that the principles of agency law operate in a situation such as this to estop corporate disavowal of its officers' action. (7 Fletcher *op. cit. supra*, § 3401 (1964). Fletcher accordingly sums up the applicable rule like this: (Vol. 2, § 463, p. 431 (1954)):

> Conceding that a person dealing with a corporation is bound to know whether or not the officer or agent who acts for it is authorized to do so, yet, if

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[2] *Consolidated Nat'l Bank* v. *The Anglo & London Paris Nat'l Bank of San Francisco*, 34 Ariz. 160, 269 Pac. 68 (1928); and *McQueen* v. *First National Bank*, 36 Ariz. 74, 283 Pac. 273 (1929). See generally on the application of *ultra vires* 7 Fletcher *op. cit. supra*, §§ 3406, 3411, 3471, 3495 (1964); 10 Fletcher *op cit. supra*, § 4959 pp. 911-12; Carpenter, Should the Doctrine of Ultra Vires Be Discarded?, 33 Yale L.J. 40 (1923); 19 Am. Jur. 2d, *Corporations* § 963 (1965). See also *Bulger* v. *Colonial House of Flushing, Inc.*, 281 App. Div. 847, 119 N.Y.S. 2d 233 (2d Dep't 1953).

> he is, and the act is within the apparent scope of his authority, the person dealing with him is not chargeable with notice of extrinsic facts making it improper for him to act in the particular case. And, by the weight of authority, this is true although the officer or agent may in fact act fraudulently and for his own purposes and benefit and not for the benefit of the corporation, if there is nothing to charge the persons dealing with him, or relying upon his act, with such misconduct. Likewise, diversion of proceeds by a corporate officer is no defense in an action against the corporation, if the officer had power, actual or apparent, to make the contract.

Petitioner (on pages 8 and 9) simply stopped his quotation from Volume 3 of Fletcher (§ 1109 at pp. 736-37 (1965)) too soon. This continues at pages 737-38 as follows:

> Accordingly, unless corporate officers are given authority, either express or implied, to pay their personal obligations with the funds of the company, it is clear that they may not lawfully do so. * * * such authority may be implied from conduct which indicates that the directors and officers of the company had previous acquiesced in acts of a similar nature, and the corporation may be estopped by its course of conduct and dealings to deny the authority of the officer or agent in the premises, as where it has apparently clothed him with such authority.

Again petitioner in quoting from Fletcher Volume 3 at pages 739-40 omitted the part we have italicized below:

> A corporation has a cause of action against a person who knowingly accepts corporate funds in payment of the individual debt of an officer of the corporation, *unless the corporation validly authorizes such an appropriation of its funds or afterwards ratifies it,* since in such case the person receiving the money and the officers are joint tortfeasors. . . . (p. 739)

Plaintiff sues here, of course, as successor to the corporation's interest and not as a representative of creditors

for monies had and received. As such he stands in the corporation's shoes and that which estops the corporation to rely on *ultra vires,* estops its successor in interest 7 Fletcher *op cit. supra* § 3447, at p. 601 (1964).

III. Even assuming the $458.55 payment to have been *ultra vires*, this would not revive the policy.

While the finding that Laing had authority to use the $458.55 disposed of the case, there are additional insuperable obstacles to petitioner's recovery. For example, even if the $458.55 payment had been a wholly naked diversion, it would at most have been voidable and not void.[3] As such, any avoidance could not retroactively revive the previously lapsed policy. *Joseph* v. *Schatzkin,* 259 N.Y. 241, 181 N.E. 464 (1932).

Moreover, the facts are clear beyond conjecture that the corporation, during Laing's lifetime, had evinced no intention of paying the premium which caused the lapse. It is uncontroverted that despite timely written and oral notification of the lapse and the procedure available to restore the policy, the corporation made no effort to tender payment of the overdue premium until after Laing's death. Thus, if the $458.55 had been included in the August 30, 1960 loan check, which was deposited to the corporate account, the policy would still have lapsed. Or, if it is assumed that the $458.55 would not have been withdrawn in the first instance from the corporate policy, the policy's automatic premium loan agreement (the previous premium having been paid by automatic premium loan) would have precluded its use to pay the premium in question (it prohibited two consecutive such payments).

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[3] 19 C.J.S. *Corporations* §§ 965, 968 (1940); 7 Fletcher *op. cit. supra,* § 3413 (1964); *Karns* v. *Industrial Comm. of Ariz.,* 50 Ariz. 466, 73 P. 2d 104 (1937); *Garden Dev. Co.* v. *Warren Ranch,* 35 Ariz. 254, 276 Pac. 839 (1929); *Zeckendorf* v. *Steinfeld,* 12 Ariz. 245, 100 Pac. 784 (1909).

In sum, the legal consequences of even a naked diversion could not put petitioner in a superior position to that in which he would have been in had there been no diversion. As indicated, because the Court found that there was no diversion, the legal tenability of petitioner's other theories were not reviewed on the appeal.

Conclusion

As is evident from its opinion, the Court of Appeals applied universally accepted principles of agency law to the undisputed facts and concluded that the general manager of this close, informally run corporation had both actual and apparent authority to use the $458.55 for his personal accommodation.

The transaction in question was a humble everyday business transaction and the Court's disposition of it fully conforms to the standards of the business community, standards which are best expressed by this Court's classic resolution in a somewhat similar apparent authority situation. *People's Bank* v. *National Bank,* 101 U.S. 181 (1879):

> * * * where one of two innocent parties must suffer by the wrongful act of a third, he who gave the power to do the wrong must bear the burden of the circumstances. (101 U.S. 181, 183).

Contrary to petitioner's unsupported assertions, the Court of Appeals created no facts, nor is its decision contrary to applicable state law. Petitioner's call for a review

to reprimand the Court is entirely out of order, and should be denied.

Respectfully submitted,

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of Counsel

(February, 1967)

APPENDIX

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ROGER T. FOLEY

Judge's Chambers
Las Vegas, Nevada
P. O. Box 1628
January 25, 1965

Wilson & McConnell
Attorneys at Law
707 Security Building
Phoenix, Arizona

ATTENTION: Miss Beverly J. McConnell:

In re: Mooreman v. Mutual of New York Life Insurance Company, No. 4359 Phx.

Dear Miss McConnell:

Your proposed amendments and additions to Findings of Fact and Conclusions of Law just recently received.

The purpose of this letter is to ascertain how you arrived at the sum of $76,697.69 as the amount in which judgment should be entered.

First let me call your attention to Item 1 on page 5, line 27 of the Opinion, Findings of Fact and Conclusions of Law which I caused to be filed December 16, 1964. Through a typographical error, Item 1 was listed as $346.80—the correct amount is $364.80.

In my judgment, the unpaid loan balance was $2491.46 not $2951 as set forth in your proposed additional Finding No. 16. I have added to that $2491.46 the sum of $351.31, the amount of the so-called "settlement check," which total

sum is $2842.77; and subtracting from $80,000 the sum of $2842.77, gives us the amount of $77,157.23, which, in my opinion, is the correct amount of the judgment.

Please inform me how you arrived at the figure $76,697.69.

In addition to the authority which I have cited in my Findings of Fact of December 16, 1964, the case of *Arizona Eastern R. Company* v. *Head,* 224 P. 1057, I am following the statement contained in 47 C.J.S. § 41, page 52, to the effect that the amount of interest rests in the sound discretion of the Court. I believe such is the fact in this case.

In view of the circumstances out of which this controversy arose, namely, the improper conduct of the president and general manager of the Laing Corporation, C. W. Laing, coupled with the negligence of the only other stockholder, Mr. E. J. Hilkert, the Insurance Company should not be further penalized by requirement to pay interest from the date of Mr. Laing's death.

You may prepare a form of judgment in the sum of $77,157.23, with interest at the rate of 6% per annum from the date of the rendition of said judgment until paid. I am inclined to enter judgment in that amount but will carefully consider your computation in arriving at the sum of $76,697.69.

Very truly yours,

ROGER T. FOLEY,
U. S. Senior District Judge

cc: Evans, Kitchel & Jenckes,
Att: Mr. Ralph J. Lester

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1966

No. 1021

ROBERT G. MOOREMAN, Trustee of the Estate of Laing-Garrett Construction Specialties, Inc.,
Petitioner;

vs.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a corporation,
Respondent.

REPLY BRIEF OF PETITIONER

Petitioner respectfully requests the Court to consider the following supplement-reply brief in support of its Petition for Certiorari:

We apologize to the Court for argument of facts and merits, at this point in the proceedings rather

than limiting discussion to whether or not certiorari is proper. This argument, however, is essential to prevent a distortion of the record as it existed upon review by the Court of Appeals.

Respondent in the Courts below has continuously argued that the diversion of corporate funds to Mr. Laing's personal use was "authorized." The Trial Court found to the contrary, and the Court of Appeals reversed. Procedurally when we get to the stage of determination of the merits of the controversy the question before this Court will be whether or not there was substantial evidence to justify the Trial Court's finding, and to prevent reversal by the Court of Appeals. It will be, and is, Petitioner's position that the Trial Transcript shows more than the necessary "substantial evidence" and that the reversal was unjustified. By way of example only, and continuously ignored by Respondent, even in their brief herein: In mid-August of 1960 Mr. Laing made the request for the loan against the corporate policy. Respondent required confirmation of the request by written application signed by the secretary of the corporation—Mr. Hilkert (Trial Transcript, Page 139). The application was signed by Mr. Hilkert on August 28, 1960, and the application was approved, but subject to resolution of the Board of Directors of the Laing corporation (Exhibits "H" and "I", Transcript, Page 145). Two days later, on August 30, after requiring the above double confirmation of authority, Respondent disbursed the loan proceeds and inconsistently with the cautious procedures followed on August 28, Re-

spondent's representative followed an oral request by Mr. Laing to divert $458.55 to payment of his personal premium (Exhibit "P"). The Trial Court has found that Respondent on August 30 when it made the loan disbursement did not have a right to believe that Laing was authorized to direct the diversion.

For purposes of determining whether or not the Petition for Certiorari herein should be granted the issue is whether or not the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to require intervention by the Supreme Court, and whether or not the Court of Appeals has refused to follow established State law and that approved by the Supreme Court. A comparison of the Opinion of the Court of Appeals and the Trial Record reflects that both of these situations exist, and that grounds for certiorari are present. The record will substantiate that not only has the Ninth Circuit refused to recognize the Trial Court's Findings of Fact, amply supported by "substantial evidence" but that the Court of Appeals has in its Opinion misstated the facts as they appear in the record, and has based its conclusions upon false premises. Respondent and the Court of Appeals wish to hold a corporate officer, merely by reason of his office, to knowledge of embezzlements and appropriations of corporate assets by another officer, not only without actual knowledge, but without proper entry thereof on the books from which they may be ascertained. Such is not the law. While one who works daily in the operation of a business and handles returned-cancelled checks, cor-

respondence, and other miscellaneous daily papers that may come into the possession of the business may be chargeable with such knowledge, an officer or member of a Board of Directors by reason of his office is not so chargeable. Contrary to argument by Respondent, the Transcript reveals that the corporation's books did not reflect any entries which were identifiable as payment of prior premiums or reflecting the shortage of payment in the loan proceeds. Reference to the records will reflect that there are entries reflecting amounts and dates which Respondent contends are payment of prior premiums, but the entries themselves are not so identifiable; and they were not so identifiable to Mr. Hilkert. Surely the law is not that Mr. Hilkert would be charged with knowledge of the transaction behind the entry when even regular audits by the auditor did not discover any such irregularity. Mr. Hilkert did have knowledge of the loan application, because he signed the application. He did not have knowledge, and the record does not show to the contrary, how the loan proceeds were disbursed, nor could he reasonably have acquired such knowledge unless he personally intercepted the receipt in the mail of the Statement of the Policy Loan Transaction (Exhibit "P"). Respondent's argument that Laing had otherwise used corporate funds is a distortion of the record and is incapable of explanation in this brief memorandum. We request the Court review the Trial Transcript for the purpose of determining this. If certiorari is granted, it will be argued and discussed extensively. For purposes herein it is sufficient to

note that whether or not the entries on Exhibits "11" and "Z" reflect Laing's use of corporate property or credit in the past is dependent upon: (a) whether or not the entries can be construed under normal accounting practices, (b) whether or not the entries must be offset against each other, (c) whether or not they reflect what has been called "accommodation purchases," (d) whether or not they reflect adjusting entries for use of a personal bank account to clear corporate checks (in order to conceal the corporate bank account from attaching creditors). Most importantly for our purposes now the Court of Appeals' Opinion, based upon the finding that Laing was indebted in excess of $22,000.00 at the time of his death, is impossible under any construction of the records before the Court.

The Trial Court having found lack of authority in both Laing and Respondent to effect the diversion of the corporate money, Respondent has under the guise of arguing "authority" seized upon an argument which amounts to estoppel (Respondent's brief, Pages 8-13). We are not here concerned about a defense of estoppel. There is no justification in the record for a finding of estoppel and none to date has been made. The elements of such a defense are clearly distinguished from the defense of denial of authority. Consider for example that a prerequisite to estoppel is a prejudicial change in position. The authorities cited by Petitioner and which will hereafter be argued reflect a lack of authority in Mr. Laing and Respondent to make the questioned diversion. The transaction

being unauthorized as a matter of law was void, and it remains void. It has not been, and cannot be, revived by virtue of ratification, acquiescence, negligence or any other conduct of the principal. In an action filed by Mr. Hilkert, however, it *may* be possible to argue estoppel as a defense. This is not the issue or the question before the Court.

CONCLUSION

The Court will find the actual question of law involved in this Petition for Certiorari is limited. Factually the transaction was not a "humble, everyday, business transaction." Respondent surely does not contend that in the normal course of its business it does make diversions of funds owned by one policy owner to the use of other policy owners. Is Respondent "one of two innocent parties," who is being unjustly prejudiced? Even were it believed that the Laing corporation was remiss in some degree in not discovering the misappropriation, Respondent has knowingly participated in a fraud upon the Laing corporation, and having done so is subject to the repercussions which result. We are concerned only with payment of sums contractually agreed to be paid, not with infliction of any penalties or damages.

We sincerely beseech the Court to grant the Petition for Certiorari to enable review, a determination of the merits of the controversy consistent with existing

applicable law, and with the facts as set forth in the Trial Record.

Dated, Phoenix, Arizona,
March 3, 1967.

Respectfully submitted,
WILLIAM P. MAHONEY, JR.,
BEVERLY J. MCCONNELL,
Attorneys for Petitioner.